IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE HARUN-UL-RASHID

THURSDAY, THE 6TH SEPTEMBER 2007 / 15TH BHADRA 1929

AS.No. 393 of 1994(B)

OS.131/1993 of THE SUB COURT, OTTAPPALAM
.....

APPELLANTS: DEFENDANTS
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1. UMMER, S/O. VEERAN, CHERUMKUZHIYIL,
CHERUKODE AMSOM, OTTAPPALAM TALUK.

2. MUHAMMEDKUTTY, S/O. VEERAN, DO. DO.

BY ADV. SRI.C.KOCHUNNY NAIR
SRI.M.C.MADHAVAN

RESPONDENT:PLAINTIFF

KUNHAVA ALIAS AHAMMEDKUTTY,
S/O. MARAKKAR, MACHINGALTHODI,
PERUMUDIYUR AMSOM,
KODUMUNDA DESOM, OTTAPPALAM TALUK.

BY ADV. SRI.K.P.DANDAPANI
SMT.JAYASREE.S.
SMT.PREETHY KARUNAKARAN

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD
ON 06/09/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

CMP 2369 OF 1994
IN
A.S. 393 OF 1994
.....

DISMISSED.

6.9.2007

Id/- Kurian Joseph, Judge.
Id/- Harun-Ul-Rashid, Judge.

KURIAN JOSEPH & HARUN-UL-RASHID, JJ.

A.S.NO. 393 OF 1994

Dated: September 6, 2007

JUDGMENT

Harun-Ul-Rashid, J.

This appeal suit was filed by the defendants in O.S.No.131 of 1993 on the file of the Sub Court, Ottappalam. The suit for specific performance of an agreement for sale of the plaint schedule property was decreed by the trial court. Hence this appeal.

2. The parties are referred to herein as the plaintiff and the defendants for the sake of convenience. The plaint schedule property belonging to the defendants having an extent of 2.63 acres is the subject matter of the suit. According to the plaintiff, the defendants agreed to sell the plaint schedule property to the plaintiff for a consideration of Rs.3 lakhs. The preliminary talk for the sale of the property was held prior to 2.11.1991 and it was decided to finalise the sale when the 1st defendant would come for leave during March 1992. According to the plaintiff, the 1st defendant came for leave during March 1992 and the agreement was finalised for sale of the property between the plaintiff and the defendants. The plaintiff paid Rs.50,000/- towards advance. It is also alleged in the plaint that the1st defendant on behalf of the defendants, handed over possession of the property to the plaintiff. The plaintiff further alleged that the defendants' younger brother Moideen received the balance consideration of Rs.2.5 lakhs from the plaintiff and thus the entire sale consideration was paid to the defendants. Since the defendants had failed to execute the requisite sale document, a lawyer notice was issued on 2.5.1993. The suit was filed for specific performance of the agreement for sale.

3. In the written statement filed by the defendants, the alleged agreement for sale was totally denied. They have also denied the receipt of the advance amount or

the balance sale consideration as alleged by the plaintiff. The alleged handing over of possession claimed by the plaintiff also was denied. In the light of the contentions raised above, the defendants pleaded that the plaintiff is not entitled to the relief of specific performance of the contract for sale.

4. Before the court below PWs.1 and 2 were examined and Exts.A1 to A14 were marked as documentary evidence. On the side of the defendants, DW.1 was examined and Exts.B1(a) to B1(c) were marked. Exts.X1 and X2 were also marked as court exhibits. Defendants 1 and 2 did not enter the box and give evidence presumably because they were abroad at the relevant time.

5. Relying on the oral evidence of PWs.1 and 2 and the available documentary evidence in support of the case set up by the plaintiff, the trial court held that the preponderance of probability is in favour of the plaintiff's case and therefore the plaintiff is entitled to a decree for specific performance of the contract. Therefore, the court passed a decree for specific performance directing the defendants to execute the sale deed with respect to the plaint schedule property in favour of the plaintiff within two months from the date of the judgment, failing which the plaintiff is at liberty to apply for the execution of the sale deed through the Execution Court. The suit was decreed with costs.

6. On an examination of the oral evidence and materials on record, we have noted that the trial court did not enter into any positive finding regarding the execution of the alleged agreement for sale. This is a case where the suit was filed for specific performance on the basis of an oral agreement for sale. The exact date on which the advance amount was received by the defendants or the exact date of receipt of the balance sale consideration is not pleaded in the plaint, nor there is any communication

between the parties for over an year from the date of the alleged oral agreement in March 1992 till Ext.A13 lawyer's notice dated 25.9.1993. Though it is alleged that the entire sale consideration was paid, there was no demand for execution of the sale deed for a considerable length of time. The plaintiff has no case that neither the advance amount nor the subsequent payment of balance sale consideration was given to the owners of the property directly. It is well settled that, before a court can grant a decree for specific performance, the contract pleaded must be a specific one and the same must be established by convincing evidence. Seeking specific performance of oral agreement supported solely by oral evidence are to be scrutinised carefully and unless there is convincing and satisfactory evidence leading to the agreement, the discretional remedy of specific performance cannot be granted. In a suit for specific performance it is incumbent on the plaintiff to plead and prove the facts and circumstances leading to the agreement for sale. The court should meticulously consider all facts and circumstances and enter positive findings as to whether such an agreement has been entered into between the parties. In a case like this, where the plaintiff comes forward to seek a decree for specific performance of sale of immovable property on the basis of an oral agreement, heavy burden lies on the plaintiff to prove that there was consensus ad idem between the parties for a concluded oral agreement for sale of the immovable property and in such cases the evidence and proof of the agreement must be absolutely clear and certain. There must be cogent and reliable evidence to base a suit for specific performance on the basis of an oral agreement. The learned Sub Judge had discussed the evidence on record and held that the preponderance of probability is in favour of the plaintiff's case. The learned Sub Judge did not enter into any positive and concluded findings as to whether the defendants had agreed to sell their property by adducing

positive proof and that whether there is the receipt of the full sale consideration by the defendants from the plaintiff. In such circumstances we are of the view that the learned Sub Judge ought to have entered positive findings on the issues to be decided between the parties.

It has been held by the Hon'ble Supreme Court in the decision in *Brij Mohan and others v. Sugra Begum and others - (1990) 4 SCC 147* that the burden is on the plaintiff to prove the existence of a concluded oral agreement and that whether there was such a concluded oral contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has been held in the above said decision that there is no requirement of law that an agreement or contract of sale of immovable property should only be in writing. However, in a case where the plaintiffs come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement alone, heavy burden lies on the plaintiffs to prove that there was consensus ad idem between the parties for a concluded oral agreement for sale of immovable property. In *S.R.Balakrishnan and another v. Yakoob and others - ILR 2001(2) Kerala 521* this court held that a decree for specific performance cannot be granted on the basis of an oral agreement supported by evidence unless there is cogent evidence to prove the agreement.

In the light of the discussion as above on the factual and legal settings, we set aside the judgment and decree under appeal and remand the case for fresh consideration in accordance with law. Since we have remanded the matter for entering positive findings on the issues between the parties, we think that an opportunity shall be given to the parties for adducing further evidence, if any. The learned Sub Judge shall grant further opportunity to the parties to adduce additional evidence, if any.

The parties will appear before the Sub Court, Ottappalam on 22.10.2007. The trial court shall dispose of the suit within a period of six months untrammelled by the observations made in the preceding paragraphs. Since the judgment under appeal is set aside and the matter is remitted to the trial court, the appellant shall be entitled to refund of the court fee.

KURIAN JOSEPH
JUDGE

HARUN-UL-RASHID
JUDGE.

mt/-

KURIAN JOSEPH &
HARUN-UL-RASHID, JJ.

A.S. No.393 OF 1994

JUDGMENT

6.9.2007